

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a
Delaware corporation,

Plaintiff,

v.

FACEBOOK INC., a
Delaware corporation,

Defendant.

CIVIL ACTION

NO. 08-862 (LPS)

Wilmington, Delaware
Friday, June 25, 2010 at 9:33 a.m.
TELEPHONE CONFERENCE

BEFORE: HONORABLE **LEONARD P. STARK**, U.S. MAGISTRATE JUDGE

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

and

KING & SPALDING
BY: PAUL J. ANDRE, ESQ.
(Redwood Shores, California)

Counsel for Leader Technologies, Inc.

BLANK ROME, LLP
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and

Brian P. Gaffigan
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1 APPEARANCES: (Continued)

2
3 COOLEY GODWARD KRONISH, LLP
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5 and

6 COOLEY GODWARD KRONISH, LLP
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8 Counsel for Facebook, Inc.

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12 P R O C E E D I N G S

13 (REPORTER'S NOTE: The following telephone
14 conference was held in chambers, beginning at 9:33 a.m.)

15 THE COURT: Good morning, counsel. This is
16 Judge Stark. Who is there, please?

17 MR. CAPONI: Good morning, Your Honor. For
18 Facebook, you have Steve Caponi from Blank Rome and Heidi
19 Keefe and Mark Rhodes from Cooley Godward.

20 THE COURT: Okay.

21 MR. ROVNER: Your Honor, good morning. This is
22 Phil Rovner for the plaintiffs; and with me on the line is
23 Paul Andre from King & Spalding.

24 THE COURT: Okay. Good morning again to
25 everybody.

1 For the record, of course, this is our case of
2 Leader Technologies Inc. v Facebook Inc. It's our Civil
3 Action 08-862-LPS.

4 The purpose of today's call is to talk about one
5 pending discovery dispute, and also I'll have some things to
6 tell you about the pretrial conference and the trial.

7 Before we get into the discovery dispute,
8 having reviewed these letters, I just want to take the
9 opportunity once again to remind everybody that it would be
10 best and it would be expected if we could get the rhetoric
11 here toned down just a little bit. The case has been marked
12 throughout and I've had occasion to discuss with the parties
13 before the allegations of bad faith and really some hyperbolic
14 rhetoric on both sides, casting aspersions on one another
15 which I think consistently have been unwarranted and certainly
16 have been unhelpful and unpersuasive. We're all going to be
17 spending quite a lot of time together over the next month or
18 so, and I don't expect to be seeing this type of conduct and
19 rhetoric as we go forward.

20 With that background, I do want to hear briefly
21 from the parties on the pending discovery dispute which is
22 essentially Facebook's request to reopen certain discovery.
23 I have read the letters but I will give each side a brief
24 opportunity to address that and I'll turn to Facebook first,
25 please.

1 MS. KEEFE: Thank you, Your Honor. Your Honor,
2 what we've learned throughout the course of the depositions
3 that Your Honor allowed us to take, the very limited
4 discovery Your Honor allowed us, was that Mr. Zacks and
5 Shamrock Technology confirmed what Facebook has suspected
6 all along, which was there were in fact public disclosures
7 of information which could yield invalidating disclosures;
8 these are disclosures without NDAs; and, in fact, that there
9 were offers to sell the underlying technology. As Your
10 Honor knows, both public disclosure of the technology or an
11 offer to sell the technology could support a Section 102(b)
12 defense to the entire case.

13 In the case of public disclosures, Mr. Zacks
14 confirmed that there were dozens of individuals who received
15 presentations regarding the patented technology who had
16 refused to sign NDAs. Leader represented that all the
17 disclosures that were ever made were under signed NDAs.
18 Mr. Zacks confirmed there were, in fact, numerous individuals
19 who refused to sign those NDAs, and the demonstrations
20 proceeded anyway.

21 Leader's argument is that they somehow had a
22 confidentiality obligation, but the testimony is clear
23 that the only thing that happened was that Mr. Zacks and
24 Mr. McKibben indicated how confidential they believed the
25 material to be, but absent a binding agreement to keep

1 those materials to be confidential, it is, in fact, a
2 public disclosure no matter how much the parties wish it to
3 be confidential. These are parties including Steve Roth of
4 Vornado Realty and everyone in his group, the Oliver Wyman
5 and Co., the Wills family of New York, both of which
6 included numerous people who were at the table, all of
7 whom refused to sign NDAs. We need to be able to conduct
8 discovery at least into them to find out what was given to
9 them because those disclosures would themselves have been
10 public disclosures of whatever was given during those
11 presentations.

12 Similarly, the limited discovery has indicated
13 that there were, in fact, offers to sell the underlying
14 technology. When Mr. Zacks testified, he testified that
15 Leader considered every single person they gave a present-
16 ation to to be a potential customer. But, more importantly,
17 they asked during the Shamrock Technologies deposition,
18 Shamrock Technologies witness Mr. Ehlers testified that he
19 went to the meeting thinking that he was going to put on a
20 sales presentation but realized, in fact, that he was the
21 customer and was on the receiving end of a sales pitch for
22 the Smart Camera. And Mr. Zacks' documents, documents we've
23 never seen before and had never been produced by Leader,
24 many of which are on Leader's letterhead or written by
25 Mr. McKibben himself, indicated the Smart Camera could only

1 be sold with the underlying Leader-to-Leader technology,
2 the software that is at issue in this case, the patented
3 technology, and so an offer to sell Smart Camera would have
4 necessarily included the patented technology and, therefore,
5 was an offer to sell the patented technology as well.

6 We need to be able to find out whether or not
7 any other offers to sell Smart Camera existed or any other
8 offers to sell the Leader-to-Leader technology existed. We
9 were actually shocked to see in Leader's letter for the
10 first time that Leader is actually admitting that it did,
11 in fact, demonstrate or make presentations about the
12 Leader-to-Leader software more than 500 times.

13 So it's this landscape that we're in right
14 now, Your Honor: The fact we have found out that despite
15 representations to the Court, there were, in fact,
16 demonstrations or presentations that existed without NDA and
17 that there were, in fact, offers to sell technology which
18 included the underlying technology, and we need to be able
19 to look into those. Now, how could we have known about any
20 of this before because the NDAs had been late produced?
21 The documents that Zacks produced came after the close of
22 discovery. All of these are things we need to be able to
23 press into in order to establish our defense under 102.

24 THE COURT: All right. Mr. Andre.

25 MR. ANDRE: Your Honor, the first thing is when

1 she discusses the Shamrock deposition, that was not
2 mentioned anywhere in their letter. It was not attached as
3 an exhibit. That was the deposition that lasted 28 minutes
4 and absolutely yielded nothing in terms of relevance, and
5 that is the reason it wasn't added, so I take that with a
6 grain of salt.

7 We never said we gave more than 500 demonstrations
8 either. We said we have 500 presentations, various versions
9 of it. In fact, Leader produced all the presentations that
10 mention Leadership software or Leader-to-Leader to Facebook
11 last year -- early last year in most cases. Presentations
12 are all marked confidential. They usually had the date and
13 the name of the person being provided the presentation on
14 them and Facebook chose not to take any discovery whatsoever
15 on those presentations because there is nothing to them.
16 They're very general in nature. They don't disclose any of
17 the patented technology. It's more of a business-oriented
18 type of presentation. Nonetheless, they didn't send a
19 single interrogatory, a single document request or do a
20 single deposition of the over 500 presentations that they
21 had available to them.

22 As far as the on-sales go, Leader produced all
23 documents related to offers for sale of the Leader-to-Leader
24 product last year as well and provided witnesses to testify
25 on that topic. Facebook identified three parties that

1 Leader allegedly offered Leader-to-Leader to sell; and that
2 is Boston Scientific, The Limited, and Wright-Patterson Air
3 Force Base. However, Facebook chose not to pursue
4 third-party discovery of those parties or any other parties
5 related to the offer to sell. Even though they had
6 subpoenaed The Limited in the case during the discovery,
7 they withdrew the subpoena though they never made an attempt
8 to get this type of information.

9 Finally, with respect to demonstrations of the
10 Leader-to-Leader product, Leader provided all documents
11 relating to the demonstration of that product last year as
12 well. Facebook chose not to take any third-party discovery
13 relating to those demonstrations; and that is what we were
14 talking about earlier in this case was is it public
15 demonstrations or not.

16 Now, the recent discovery of the six entities
17 that Facebook took, five of them confirm that Leader
18 insisted on confidentiality. They all signed the NDAs, and
19 they also confirm that Leader-to-Leader was not ready for
20 sale in 2002. They weren't selling a product. They didn't
21 have one done.

22 Facebook hangs its hat pretty much on the
23 testimony of their former counsel, Benjamin Zacks, who is an
24 adverse witness to Leader. They're in active litigation
25 against each other. Even as an adverse witness, Mr. Zacks

1 confirmed that all the presentations of the technology were
2 general in nature; and you can see that in Exhibit B of our
3 letter brief.

4 Nothing was presented without understanding
5 that there could be confidential nature of the disclosures;
6 and Leader did not offer to sell any products as far as he
7 was aware -- I mean the Leader-to-Leader product because it
8 wasn't ready to be sold in 2002. That testimony was
9 unambiguous. He did testify that some people did not sign
10 NDAs; and we have shown the Court that he was simply wrong
11 about that, the people he identified. They did, in fact,
12 sign NDAs.

13 And just remind the Court, the NDAs, they
14 were never asked for in discovery, there are no claims ever
15 alleged during discovery that would make the NDAs relevant,
16 and they're only relevant to our defenses.

17 Facebook's position that confidential agreements
18 are evidence of nonconfidential disclosures are just a non
19 sequitur.

20 In this case, Facebook has taken or they have
21 issued over 70 subpoenas to 50 different entities. 27 of
22 those subpoenas are for depositions. In the meet and confer
23 we had before this call with Your Honor, we asked them to
24 actually give us what kind of discovery do they want and
25 give us the limit of what they want, who they want to take,

1 so that we can actually give an informed decision. They
2 couldn't tell us. Their letter says there are potentially
3 hundreds of third-party witnesses they would be interested
4 in taking discovery from.

5 I don't need to remind the Court that the Rule
6 30 limit of 10 depositions was put there for a reason; and
7 the reason being it would be cost effective in this type of
8 discovery dispute. Facebook has blown well past the 10
9 depositions. They want to take obviously hundreds of more
10 depositions, and they can absolutely spend Leader to
11 oblivion. There is no basis for them to take additional
12 discovery. They had the presentation, they had the sales
13 information, they had the demonstrations. We don't think
14 that any more discovery is necessary, and we don't believe
15 that a further delay of this trial is necessary either.

16 Thank you.

17 THE COURT: Okay. Thank you.

18 Ms. Keefe.

19 MS. KEEFE: Just a couple of things, Your Honor.

20 The first thing. I did forget to mention that
21 we also need a privilege log for the materials that Leader
22 has withheld from Mr. Zacks's production. They've given no
23 reason other than the fact that it would be, you know, a
24 lot of work for them, and the fact that maybe some of the
25 documents weren't relevant; but Mr. Zacks indicated that he

1 thought there was no privilege in these documents and that
2 they were responsive to the subpoena. So if Leader is
3 withholding them, we need a privilege log showing why
4 they're being withheld and what the basis is for their claim
5 of privilege.

6 Regarding Facebook's knowledge of any of these
7 materials, Your Honor has already heard the argument from
8 us; but, absolutely, we could not have known about these
9 materials. We would not have known about them absent the
10 NDAs that were late produced indicating to us just how many
11 people received these demonstrations.

12 There is actually a case, Your Honor, System
13 Management -- that I found after we submitted our letter,
14 **System Management Arts v Avesta Technologies**, 87 F.Supp. 2d
15 258, which also talks about the fact that beyond any single
16 individual offer for sale or public demonstration, part of
17 looking at 102(b) is how many public demonstrations or how
18 many demonstrations there were and the totality of the
19 circumstances to see exactly how public the demonstration
20 was.

21 There is another case, **Articulate v Apple**, 53
22 F.Supp. 2d 62, which discusses the need to considered the
23 totality of the circumstances in light of the various
24 policies underlining public use bars and, specifically,
25 cites the number of people to whom an invention or product

1 embodying the invention was disclosed.

2 And so, Your Honor, it's not a matter of any one
3 individual demonstration, although those are also helpful,
4 but also a matter of how many times this demonstration was
5 given that goes to the notion of how public these
6 demonstrations were or how much the jury can imply that in
7 fact there were offers to sell given the sheer volume of
8 presentations that were made.

9 THE COURT: Okay. Thank you, counsel. I'm
10 prepared to rule on this discovery dispute.

11 With respect to Facebook's request to reopen
12 discovery and continue the trial date for perhaps 60 days,
13 that request is denied. The Court finds that in the
14 totality of circumstances, including the number of discovery
15 disputes that have preceded today and the discovery that
16 has been given on issues relating to Facebook's defenses,
17 including relating to offers to sell and the related defenses,
18 the Court concludes that Facebook has had sufficient
19 discovery to assess the merits of these defenses and to put
20 on these defenses. The Court is not persuaded that there is
21 any justification here to reopen discovery and to delay
22 trial at this very late date.

23 The one relief that the Court will give to
24 Facebook is the Court is directing and ordering that Leader
25 produce a privilege log, logging the withheld Zacks documents,

1 any that have been withheld on the basis of privilege and to
2 do so within seven days, so that would be next Friday.

3 Leader, as the party asserting privilege over
4 those documents, does have the burden of establishing at
5 least a prima facie basis for the assertion of privilege;
6 and the way to do that, of course, is through a privilege
7 log.

8 So that takes care of the pending discovery
9 dispute. I do want to, at this time, note a few other
10 matters.

11 First, as I trust that the parties will have
12 seen, there were some rulings that were issued yesterday.
13 First, at D.I. 558, Judge Farnan overruled objections of the
14 parties that were pending to certain earlier discovery
15 rulings. And then at D.I. 559, the Court granted in part
16 and denied in part Facebook's motion for leave to amend its
17 counterclaims and affirmative defenses.

18 Let me now tell you some things that I think
19 will help focus you as you prepare for trial and for the
20 pretrial conference scheduled for next Thursday, July 1st.

21 The first of those is that the Court has decided
22 in the exercise of its discretion to separate certain issues
23 from the trial that will begin on July 19th pursuant to
24 Federal Rule of Civil Procedure 42(b) which allows the Court
25 to separate issues for trial. To further convenience,

1 efficiency, economy and to avoid prejudice, the Court has
2 decided that the following issues will be separated and will
3 not be tried at the July 19th trial. Those issues that are
4 being separated are:

5 First, Leader's claim of willful infringement.

6 Second, Leader's claim for damages and injunctive
7 relief.

8 Third, Facebook's false marking counterclaim,

9 And,

10 Fourth, Facebook's counterclaim and affirmative
11 defense of inequitable conduct.

12 All of those matters will be separated and will
13 be tried at a later date to be determined following the
14 conclusion of the July 19th trial. So the July 19th trial
15 will be limited to issues of infringement and invalidity of
16 the patents and the remaining defenses, counterclaims of
17 Facebook that I have not ordered separated.

18 As a consequence of the decision to separate out
19 certain issues for separate trials, a number of the pending
20 motions are going to be, and hereby are, denied without
21 prejudice, to be renewed at a later date subsequent to the
22 July 19th trial. Specifically, those motions that are here
23 by denied without prejudice are:

24 First, Facebook's Motion For Summary Judgment
25 No. 2 of Non-Infringement and No Damages, which is D.I. 385.

1 Second, Facebook's Motion For Summary Judgment
2 No. 4 of No Willful Infringement, which is D.I. 394.

3 Third, Leader's Motion For Summary Judgment of
4 Facebook's False Marking Counterclaim, which is D.I. 395.

5 Then turning to the motion in limines:

6 Facebook's Motion in Limine No. 4, To Preclude
7 Evidence Or Argument Relating to Damages From Internal Use
8 of Accused Systems By Facebook Employees, D.I. 412.

9 Facebook's Motion in Limine No. 8, To Preclude
10 Leader From Referring to Or Introducing Any Evidence
11 Relating to Any Alleged Acts of Hacking Or Unauthorized
12 Access By Facebook or Mark Zuckerberg, which is D.I. 412.

13 Facebook's Motion in Limine No. 9, To Exclude
14 Evidence Or Argument That Mark Zuckerberg Copied Leader's
15 White Papers -- I'm not sure I have the D.I. numbers
16 correct -- okay, which I guess is also D.I. 412.

17 And we'll get this all out in a written order,
18 counsel.

19 So Facebook Motion in Limine No. 9 is denied
20 without prejudice.

21 Facebook's Motion in Limine No. 11, to preclude
22 references to Hurricane Katrina and Terrorism Over At
23 Virginia Tech, D.I. 412.

24 Facebook's Motion in Limine No. 12, To Include
25 Testimony and Evidence of Advice of Counsel As a Defense to

1 Facebook False Marking Counterclaim, also D.I. 412.

2 The following Leader motions are also denied
3 without prejudice:

4 Leader's Motion in Limine No. 3, To Exclude
5 Evidence of Facebook's Settlement Agreement and Expert
6 Testimony Regarding Potential Design-Arounds Or
7 Noninfringing Alternatives, which is D.I. 419.

8 Leader's Motion in Limine No. 7, To Exclude
9 References to a Potential Injunction, which is D.I. 423.
10 And,

11 Also Leader's Daubert Motion to Exclude the
12 Testimony in Its Entirety of Facebook's Experts, James
13 Hughes and Kimberly Felix, D.I. 426, also denied without
14 prejudice.

15 A couple of other matters. Pending before the
16 Court is D.I. 377, Facebook's Motion For Redaction of
17 Electronic Transcript of Hearing Dated April 9th, 2010.
18 That motion is hereby denied.

19 The Court has reviewed Facebook's proposed
20 redactions and does not find that any of what is proposed
21 to be redacted discloses confidential information under the
22 confidentiality protective order and, in any event, sees no
23 basis to protect or keep from the public the information
24 that Facebook proposes to redact.

25 We will certainly be talking about the proposed

1 pretrial order in much greater detail on Thursday when
2 we're all together, but there is one matter I wanted to
3 point out. The parties had proposed that they will have
4 a meet-and-confer procedure every night following trial
5 in which they'll exchange certain e-mails and have a
6 teleconference and then present unresolved objections for
7 the Court to address in the morning before each trial day.

8 The Court does not intend to permit that
9 procedure. I believe that would allow important disputes
10 to linger too long and interfere with the orderly and
11 inefficient trial process which is especially necessary when
12 a jury is involved.

13 Other than true emergencies or something that
14 truly could not be anticipated, the Court's intent is to
15 decide these matters prior to the start of the trial. So we
16 will work together and the parties will meet and confer as
17 much as is necessary over the next several weeks so that we
18 can be in a position to decide these matters at the pretrial
19 conference on July 1st.

20 I am, and hereby do, schedule a second pretrial
21 conference for Friday, July 16th at 10:00 a.m. That's the
22 last business day before we begin trial on Monday the 19th.
23 So we'll meet again next Thursday, and then we'll meet as
24 well on the morning of July 16th at 10:00 a.m.; and again
25 the intent is that we will resolve these issues no later

1 than that July 16th conference.

2 As I'd said, I will get a written order out for
3 you that embodies the decisions that I have given you today
4 and then we will look forward to seeing all of you next
5 Thursday morning.

6 Is there anything further that needs to be
7 discussed at this time, Ms. Keefe?

8 MS. KEEFE: Your Honor, just one question. You
9 mentioned that Summary Judgment No. 2 was denied without
10 prejudice? Summary Judgment No. 2 had to do with mini
11 auction, which is a non-infringement issue. Was that a
12 mistake.

13 THE COURT: It may have been. Just bear with me
14 a minute, please.

15 MS. KEEFE: Sure.

16 (Pause.)

17 THE COURT: Thank you for raising that, Ms.
18 Keefe.

19 You have thrown a lot of stuff at us, you will
20 recognize.

21 MS. KEEFE: I do, Your Honor. Of course.

22 THE COURT: My recollection is that there were
23 two issues in that motion. One went to infringement and one
24 went to damages, and my intent is to deny without prejudice
25 the portion of the motion that goes to damages but not the

1 portion that goes to non-infringement. So I will attempt to
2 word that more carefully in the written order that I get
3 out, but that was the intent.

4 MS. KEEFE: Thank you, Your Honor.

5 Similarly, with respect to the summary judgment
6 motion, is Your Honor contemplating setting a date for
7 hearing on the remaining motions for summary judgment?

8 THE COURT: Yes. Those are on the table for
9 next Thursday at the pretrial conference.

10 MS. KEEFE: Thank you, Your Honor. Does that
11 mean we should be prepared to argue them next Thursday at
12 the pretrial conference?

13 THE COURT: If you wish to be heard, you should
14 be prepared.

15 MS. KEEFE: Thank you.

16 THE COURT: I'm not promising you I'll hear you
17 on all of them but you should be prepared to address them,
18 if you wish to do so.

19 MS. KEEFE: I absolutely understand. I
20 appreciate that, Your Honor. Thank you.

21 THE COURT: Mr. Andre.

22 MR. ANDRE: Your Honor, just a couple issues.

23 With regards to the summary judgments, obviously,
24 we followed the procedure set by Judge Farnan. We just put
25 the material issues of disputed facts, and we didn't

1 actually brief out the oppositions thoroughly because that
2 was Judge Farnan's instructions. I assume that if there is
3 anything that would be taken into consideration, we have
4 further opportunity to brief out the opposition properly?

5 THE COURT: I'm certainly aware of how we got to
6 where we are, and if I need further briefing on anything, I
7 will let you know that. And if there is any pending matter
8 that you are requesting leave to further brief, you should
9 be prepared to address that at next Thursday pretrial
10 conference.

11 MR. ANDRE: And then with respect to the motions
12 that you are denying without prejudice, Your Honor, one that
13 you didn't mention was Facebook's Daubert Motion No. 3,
14 which was to preclude our damages expert. I assume that
15 since damages are being bifurcated from the trial that that
16 was one that would be denied without prejudice as well?

17 THE COURT: I think you are right. I think
18 that was probably an oversight. And, of course, we'll take
19 another look at that as we prepare the written order for you.

20 MR. ANDRE: And then the last thing is you have
21 given us seven days to prepare a privilege log document to
22 Mr. Zacks, test and control. To the extent that we are not
23 able to get those copies from him, if he is, for whatever
24 reason, not cooperative with us in giving us those documents,
25 can we come back to the Court and ask for an extension of

1 that time?

2 THE COURT: If it turns out to be something
3 beyond your control, yes.

4 MR. ANDRE: Okay. We'll try to see if he will
5 send the documents to us so we can do the privilege log. If
6 he refuses to do so, we can try to -- I don't know if we can
7 fly someone there to Ohio to do it, or ...

8 THE COURT: Is there anything else, Mr. Andre?

9 MR. ANDRE: I think that is it, Your Honor.

10 THE COURT: Okay. Thank you, counsel. We will
11 see you next Thursday. Good-bye.

12 (Telephone conference ends at 10:03 a.m.)
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